

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ALFONSO HERNANDEZ TAPIA	§	
v.	§	CIVIL ACTION NO. 6:13cv212
		Crim. No. 6:08cr36
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Movant Alfonso Hernandez Tapia, proceeding *pro se*, filed this motion to vacate or correct his sentence under 28 U.S.C. §2255, complaining of the validity of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Tapia was convicted of the offense of being an alien found illegally in the United States, in violation of 8 U.S.C. §1326(a) and (b)(2). He pleaded guilty and received a sentence of 90 months in prison on December 4, 2008. Tapia did not take a direct appeal, but filed this motion to vacate or correct sentence on February 10, 2013, complaining that he received ineffective assistance of counsel.

The Government was ordered to answer and filed a response arguing that Tapia's motion is barred by the statute of limitations. Tapia did not file a reply to the Government's response, but argued in his original motion to vacate that he was entitled to equitable tolling because he was "deceived" by his attorney.

After review of the pleadings, the Magistrate Judge issued a Report recommending that the motion to vacate be denied based upon the expiration of the statute of limitations. The Magistrate Judge, citing United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002) and United States v. Wynn, 100 Fed.Appx. 325, 2005 WL 1345112 (5th Cir.), *cert. denied*, 543 U.S. 999 (2004) (appeal after remand from 292 F.3d 226, 230 (5th Cir. 2002)), determined that Tapia failed to show the “rare and extraordinary circumstances” required for equitable tolling of the statute of limitations, nor did he show that he had pursued his rights diligently but some extraordinary circumstance stood in his way. The Magistrate Judge also recommended that Tapia be denied a certificate of appealability *sua sponte*.

A copy of the Magistrate Judge’s Report was sent to Tapia at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. *See* United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243 (1989) (where no objections to a Magistrate Judge’s Report are filed, the standard of review is “clearly erroneous, abuse of discretion and contrary to law.”). It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 11) is hereby ADOPTED as the opinion of the District Court. It is further


ORDERED that the above-styled motion to vacate or correct sentence is hereby DISMISSED with prejudice. It is further

ORDERED that the Movant Alfonso Hernandez Tapia is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby
DENIED.

It is SO ORDERED.

SIGNED this 19th day of August, 2013.



MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE